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Person To Contact:

, ID No.

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Refer Reply To:

CC:PSI:B03

PLR-120304-08

Date:

September 16, 2008

X =

Trust =

Trust Agreement =

Dear :

We received a letter dated April 8, 2008, submitted on behalf of X by its authorized representatives, requesting a supplemental ruling that, under proposed new terms of the Trust Agreement, the Trust is not treated as owned by the grantor or another person under subpart E of part I of subchapter J of chapter 1 of the Internal Revenue Code for any period during which the § 646(c) election is not in effect for the Trust. This letter ruling responds to that letter and modifies a prior letter ruling (PLR 200733013) letter dated April 25, 2006 ("Prior Letter Ruling"), submitted on behalf of X and the Trust, requesting rulings on several issues arising from the establishment, funding, and potential termination of the Trust under § 646 and other provisions. The entire text of the Prior Letter Ruling is hereby incorporated by reference, except as modified below, for purposes of this supplemental letter ruling.

FACTS

The information submitted states that X proposes certain changes to the Trust Agreement relating to certain distributions of income. Under the Trust Agreement in the Prior Letter Ruling, X may transfer additional assets to the Trust, which assets are

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specially designated as an "Endowment." In such a case, the trustees of the Trust are directed to invest such assets and to distribute the earnings, less expected expenses, to the beneficiaries on an annual basis. Such an annual distribution would not preclude an additional distribution in the same year as described in the Prior Letter Ruling.

X has concerns that under the distribution provisions in the Trust Agreement in the Prior Letter Ruling, the value of assets in the Endowment may be eroded by inflation and the amount available for distribution per beneficiary may be reduced by fluctuations in the number of beneficiaries. To address these concerns, the Trust Agreement will be modified to give the trustees of the Trust discretion to withhold from distribution of income from the Endowment amounts adequate to protect it from inflation and to account for fluctuations in the number of beneficiaries.

The Trust Agreement will also be modified to provide that only one of the five trustees may be an employee of X or its affiliates, so that discretionary powers given to the trustees with regard to these distributions of income will be exercised by persons who are not related or subordinate to the grantor of the Trust. Only a natural person may be appointed as a trustee of the Trust. The Trust Agreement also provides that the trustees are prohibited from exercising any power primarily for the benefit of X or its affiliates, rather than for the benefit of the beneficiaries.

As noted in the Prior Letter Ruling, the Trust Agreement provides that except as provided in 43 U.S.C. § 1629e(c), the Trust assets are not subject to the claims of the creditors of X or to satisfy any liabilities of X.

X represents that (1) any transfer to the Trust will consist of less than substantially all of X's assets so that the shareholders will not be required to approve the conveyance of assets to the Trust; (2) at the time of the transfer of any assets to the Trust, the transfer will not render X unable to satisfy claims based upon 43 U.S.C. § 1629e(c)(1), (2), or (3), render X insolvent, or occur when X is insolvent; (3) after any transfer of assets to the Trust, the assets retained by X will be more than adequate to meet its obligations; and (4) the Trust will make the election under § 646(c) to have the provisions of § 646 apply to the Trust.

LAW & DISCUSSION

X requests a ruling that the Trust is not treated as owned by the grantor or another person under subpart E for any period during which the § 646(c) election is not in effect for the Trust. Section 646 will sunset on December 10, 2010, if not extended; thus, it is necessary to determine whether the Trust would be treated as owned by the grantor or another person under subpart E after the sunset of § 646. The following

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analysis and conclusions are based on current provisions of the Code, which provisions may or may not be applicable after the sunset of § 646.

Section 671 provides, in general, that if the grantor of a trust or another person is treated as the owner of any portion of the trust, that person's taxable income and credits shall include the income, deductions, and credits of the trust attributable to that portion of the trust to the extent that such items would be considered in computing the taxable income or credits of an individual.

Sections 673 through 678 specify circumstances under which the grantor or another person will be regarded as the owner of a portion of the trust. The Trust Agreement, as currently drafted, reveals none of the circumstances that would cause the grantor or any other person to be treated as the owner of any portion of the Trust under §§ 673, 676, or 678.

Under § 674(a) and applicable regulations, the grantor is treated as the owner of any portion of a trust in respect of which the beneficial enjoyment of the corpus or the income therefrom is subject to a power of disposition, exercisable by the grantor or a nonadverse party, or both, without the approval or consent of any adverse party.

Section 674(c) provides, in part, that § 674(a) shall not apply to a power solely exercisable (without approval or consent of any other person) by a trustee or trustees, none of whom is a grantor, and no more than half of whom are related or subordinate parties who are subservient to the wishes of the grantor (1) to distribute, apportion, or accumulate income to or for a beneficiary or beneficiaries, or to, for, or within a class of beneficiaries; or (2) to pay out corpus to or for a beneficiary or beneficiaries to or for a class of beneficiaries (whether or not income beneficiaries).

Section 1.674(d)-2 of the Income Tax Regulations provides that the exceptions described in §§ 674(b)(6) and (c) are not applicable (a) if the grantor has the power to remove, substitute or add trustees except upon certain limited conditions, or (b) if any person has a power to add to the beneficiary or beneficiaries or to a class of beneficiaries designated to receive the income or corpus, except where the action is to provide for after-born or after-adopted children. This limitation does not apply to a power held by a beneficiary to substitute other beneficiaries to succeed to his interest in the trust (so that he would be an adverse party as to the exercise or non-exercise of that power).

Section 672(a) provides that for purposes of subpart E, the term "adverse party" means any person having a substantial beneficial interest in the trust that would be adversely affected by the exercise or nonexercise of the power that he possesses

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respecting the trust. A person having a general power of appointment over the trust property shall be deemed to have a beneficial interest in the trust.

Section 672(b) provides that for purposes of subpart E, the term “nonadverse party” means any person who is not an adverse party.

Section 672(c) provides that for purposes of subpart E, the term “related or subordinate party” means any nonadverse party who is (1) the grantor’s spouse if living with the grantor; or (2) any of the following: The grantor’s father, mother, issue, brother or sister; an employee of the grantor; a corporation or any employee of a corporation in which the stock holdings of the grantor and the trust are significant from the viewpoint of voting control; a subordinate employee of a corporation in which the grantor is an executive.

In this case, the grantor of the Trust, X, holds no power to affect the beneficial enjoyment of any portion of the Trust. The trustees of the Trust are authorized to make distributions of earnings from the Endowment after reducing the earnings for reasonable anticipated expenses of the Trust for the next year and to account for any projected increases on the number of beneficiaries, all as reasonably calculated by the trustees. Thus, the trustees have discretion in determining the amount of income to hold back to protect the Endowment from inflation and to account for increases in the number of beneficiaries. The exercise of this discretionary power will affect the amount distributed to the beneficiaries each year and may be viewed as a § 674(a) power, unless one of the exceptions to § 674(a) applies.

Section 674(c) permits an exception to § 674(a) for certain powers over income or corpus of independent trustees. In this case, X, the grantor, does not hold any power to affect the beneficial enjoyment of any portion of the Trust. In addition, the trustees of the Trust are prohibited from exercising any powers vested in them primarily for the benefit of X or its affiliates, rather than for the benefit of the beneficiaries. The Trust is required to have five trustees, at least two of which must be members of the Board of Directors of X. The trustees are not “employees” of the corporation as that term is defined for purposes of § 672(c)(2) merely because they are directors of X. Rev. Rul. 66-160, 1966-1 C.B. 160.

In the present situation, X does not have the power to remove, add, or substitute trustees without cause and no person has the authority to add beneficiaries within the meaning of § 1.674(d)-2(b). Under the Trust Agreement, no more than one trustee may be an employee of X or its affiliates at any given time. Any trustee who is an employee of X would be a related or subordinate party with respect to X. However, that trustee would be but one of five trustees. Thus, fewer than half of the trustees are related or subordinate parties who are subservient to the wishes of X. Accordingly, the powers

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held by the trustees fall within the exception provided in § 674(c), and X will not be treated as the owner of any portion of the Trust under § 674(a).

Under § 675 and applicable regulations, the grantor is treated as the owner of any portion of a trust if under the terms of the trust agreement or circumstances attendant on its operation, administrative control is exercised primarily for the benefit of the grantor rather than the beneficiary of the trust.

Our examination of the Trust Agreement, as currently drafted, reveals none of the circumstances that cause administrative controls to be considered exercisable primarily for the benefit of the grantor under § 675. The Trust Agreement specifically provides that the trustees are prohibited from exercising any power primarily for the benefit of X or its affiliates, rather than for the benefit of the beneficiaries. Thus, the circumstances attendant on the operation of the Trust will determine whether the grantor will be treated as the owner of any portion of the Trust under § 675. This is a question of fact, the determination of which must be made by the Director, Field Operations, with which the parties file their tax returns.

Section 677 provides that the grantor shall be treated as the owner of any portion of a trust, whether or not the grantor is treated as the owner under § 674, the income of which is, or, in the discretion of the grantor or a nonadverse party, or both, may be distributed to the grantor or held or accumulated for future distribution to the grantor, without the approval or consent of any adverse party.

Section 677(a)-1(d) provides that a grantor shall be treated as the owner of a portion of a trust whose income is, or in the discretion of the grantor or a nonadverse party, or both, may be applied in discharge of a legal obligation of the grantor.

Assets held by a Settlement Trust may not be used to satisfy the debts of an ANC unless those assets were encumbered before their conveyance to the Settlement Trust, or their conveyance rendered the corporation insolvent or occurred when the corporation was insolvent. 43 U.S.C. § 1629e(c)(5). X has represented that it will comply with the provisions of the ANSCA, thus X will not transfer assets to the Trust that were encumbered before being transferred, that render X insolvent, or that are transferred while X is insolvent. X represents that in all events it will retain sufficient assets following each contribution to the Trust so that the claims of all existing creditors of X can be satisfied from corporate assets without resorting to trust assets. Therefore, based on all the facts and circumstances, including X's representations, X will not be treated as the owner of any portion of the Trust under § 677.

CONCLUSION

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Accordingly, based solely on the facts submitted and the representations made in this ruling request and the Prior Letter Ruling , and viewed in light of the applicable law and regulations, we rule that neither X nor any other person will be treated for federal income tax purposes as the owner of the Trust or any portion of the Trust under current §§ 673 through 678 for any taxable years for which the Trust does not have a § 646(c) election in effect. (e.g., after the sunset of § 646).

Except as specifically set forth above, we express or imply no opinion as to the federal tax consequences of the transaction described above under any other provisions of the Code.

Under a power of attorney on file with this office, we are sending a copy of this letter to X's authorized representatives.

This ruling is directed only to the taxpayer who requested it. According to ' 6110(k)(3), this ruling may not be used or cited as precedent.

Sincerely,

/s/

James A. Quinn
Senior Counsel, Branch 3
Office of Associate Chief Counsel
(Passthroughs and Special Industries)

Enclosure: copy of this letter for ' 6110 purposes